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No. 15870

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. D. Reeder Contractors of Arizona, an Arizona corporation,

Appellant,

vs.

Higgins Industries, Inc., a Louisiana corporation,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

This is an appeal by L. D. Reeder, contractors of Arizona (hereinafter referred to as "Reeder"), plaintiff below, from an order of the United States District Court for the Southern District of California, Central Division, William M. Byrne, Judge, dismissing the action below as to the appellee-defendant, Higgins Industries, Inc. (hereinafter referred to as "Higgins"), on the ground that the said court could not acquire jurisdiction over Higgins.

The jurisdiction of the court below was founded upon Section 1332 of Title 28, United States Code. This action is one in which there is diversity of citizenship between all parties; Reeder is an Arizona corporation,

Higgins is a Louisiana corporation, and McCauley Lumber and Flooring Co., Inc., the co-defendant below, is a California corporation [R. 1, 2].

Higgins filed a motion to dismiss and to quash service; affidavits were filed; the motion was granted on November 1, 1957 [R. 85]; the formal order granting the motion and dismissing the action as to Higgins was filed November 25, 1957 [R. 87]; Reeder filed its notice of appeal on December 26, 1957 [R. 88], and the cause was docketed in this court.

The jurisdiction of this court is based upon Section 1291 of Title 28, United States Code.

Statement of the Case.

Appellant, as plaintiff, filed the action below against appellee Higgins, the manufacturer, and McCauley Lumber and Flooring Co., Inc. (hereinafter referred to as "McCauley"), the wholesaler, of Higgins wooden flooring block which proved highly defective [R. 1-19].

Higgins moved to dismiss on numerous grounds, particularly that it was a foreign corporation, not amenable to service of process in California [R. 20-22]. Affidavits in support of the motion were filed on August 26, 1957 [R. 23-46], and September 5, 1947 [R. 47-49].

Appellant filed affidavits in opposition to the motion on October 11, 1957 [R. 50-68], and Higgins filed supplemental affidavits in support of the motion on October 23 and October 25, 1957 [R. 69-82, 83-84].

The matter having been submitted for decision, the court below, by minute order, ordered the motion granted "on the ground that the court does not have jurisdiction over said defendant [Higgins] because it is not doing

business in the State of California" [R. 85]. The formal order was filed, dismissing the action as to Higgins on November 25, 1957 [R. 86-87].

The *uncontradicted* facts appearing from the affidavits are:

a. Higgins has shipped into California, at a conservative estimate, one million dollars worth of its merchandise per year for the past two years; its volume of California business has been expanding since 1951 [R. 50, 61].

b. Officers of Higgins have made at least three visits to California in recent years in connection with its business [R. 70, 72, 51, 65, 67]; that the said officers did the following in furtherance of Higgins' business:

(1) Conferred and consulted with salesman of McCauley concerning sales and merchandising matters and techniques of application of Higgins' product, and consulted with employees of a flooring applicator concerning construction jobs and details of its business, and visited customers of McCauley in connection with sales [R. 51, 70, 73].

(2) Visited the office of appellant at Los Angeles in connection with shipping advices for the block which gave rise to this action, threatening to cancel unless shipment was requested immediately, and discussed a construction project in which appellant was interested [R. 65-68; 53]; the officer stated that he would personally check the progress of construction at the job involved in this suit, but neglected to do so [R. 53, 66, 70].

c. Higgins has advertised and continues to advertise on a wide scale in national and trade maga-

zines having circulation in California [R. 51-52, 60, 70]; the inquiries resulting from such advertising are sent to the distributors in California for sales follow-up as a regular course of business [R. 58, 60-61, 70]. In addition, in connection with advertising and solicitation of sales in California, Higgins:

(i) Supplies advertising mats to its distributors here for advertising in local media [R. 52, 61];

(ii) Supplies advertising brochures [R. 61];

(iii) Supplies funds to the Hardwood Flooring Council of Southern California for the promotion of hardwood products as a flooring material, as a result of which Higgins Block is exhibited by the Council at home shows and fairs in this area [R. 52, 62, 70-71, 73-75];

(iv) Higgins keeps informed as to construction projects in the offing; it keeps close contact with its distributors and urges its distributors to have their customers bid on the same [R. 62, 60];

(v) Higgins directly solicits owners and architects in order that its product may be specified for use in a particular project, as is shown by the fact that its representative contacted the owner and architect of the construction project for which the material involved in this action was ordered [R. 24]; thereafter, it checks through its distributors on progress, as it did in this instance [R. 53]; follows through on the shipping of the material involved (*supra*, b(2)), and even meets with the owners and

architect when complaint is made as was done when the material shipped to appellant proved defective [R. 54].

In addition to the above, certain *controverted* facts are of importance:

(1) The distributors, including McCauley, ordered from Higgins, as a general rule, F.O.B. Los Angeles, and have acted in accordance therewith [R. 52-53, 55, 58, 60]. Typically, orders upon Higgins are specifically marked F.O.B. point of delivery [R. 28, 29, 55], but the acknowledgements are equivocal as to passage of title [R. 31, 32, 33, 34, 56]. Higgins, on the other hand, contends that all shipments are F.O.B. Louisiana [R. 24, 35, 48, 71, 73, 84].

(2) The distributors aver that they have adjusted customer complaints on Higgins' behalf and at its expense [R. 54, 58-59, 61], which is denied in the conjunctive [R. 75].

In connection with the question of passage of title and F.O.B. provisions, it is interesting to note that the documents indicate that the minds of the parties did not meet, and therefore title did not pass until acceptance in California.

Specification of Error.

I.

The court below erred in holding that appellee was not doing business in the State of California.

II.

The court below erred in holding that appellee was not amenable to process issued by a court sitting in California.

ARGUMENT.

A. Service Upon Higgins Will Not Violate Due Process.

In a decision rendered as recently as December, 1957, the United States Supreme Court has reclarified the due process requirements in connection with service upon a foreign corporation. In *McGee v. International Life Insurance Company,* 78 S. Ct. 199, 2 L. Ed. 2d 223, the court stated:

> "Since Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries. But just where this line of limitation falls has been the subject of prolific controversy, particularly with respect to foreign corporations. In a continuing process of evolution this Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations. See Henderson, the Position of Foreign Corporations in American Constitutional Law, c. V. More recently in International Shoe Co. v. State of Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95, the Court decided that 'due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' Id. 326 U. S. at page 316, 66 S. Ct. at page 158.
>
> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the

permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.

"[3] Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state."

In the *McGee* case, the foreign corporation had, by mail, offered to continue a contract of insurance which a California insured had previously entered into with another insurance company. The insured mailed his premiums from California to Texas, the home of the insurance company, and these relatively few mail transactions were all that occurred. The Supreme Court noted that the record failed to disclose that the insurance company had ever solicited or done any insurance business in California apart from the policy involved in that case. Nevertheless, it held that the requirements of due process had been met where the insurance company had been served by mail with process issuing from a California court.

Upon a reading of the *McGee* case, it is clear that appellee Higgins has more than sufficient contact with the State of California under the due process requirements, so that substituted service upon it issued by a court sitting in California would be valid.

B. Under California Law, Higgins Is Amenable to Service of Process.

The California courts have been unequivocal in asserting jurisdiction to the extent permitted by due process of law.

The California statutes authorize service of process on foreign corporations that are "doing business" in the State. The term "doing business" is a descriptive one which the courts have equated with such minimum contacts with the State "that the maintenance of the suit does not offend internal 'traditional notions of fair play and substantial justice.'" (*International Shoe Co. v. Washington,* 326 U. S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95, 161 A. L. R. 1057.)

"Doing business" within the meaning of the California statutes is synonymous with the power of the State to subject foreign corporations to local process; in other words, the limits of "doing business" are those of due process.

> *Eclipse Fuel etc. Co. v. Superior Court,* 148 Cal. App. 2d 736, 738, 307 P. 2d 739.

See also:

> *Gray v. Montgomery Ward, Inc.,* 155 Cal. App. 2d ....., ..., 317 P. 2d 114;
>
> *McClanahan v. Trans-America Ins. Co.,* 149 Cal. App. 2d 171, 172, 307 P. 2d 1023;

Jeter v. Austin Trailer Equipment Co., 122 Cal. App. 2d 376, 387, 265 P. 2d 130;

Kneeland v. Ethicon Suture Laboratories, Inc., 118 Cal. App. 2d 211, 218-224, 257 P. 2d 727, and cases cited;

LeVecke v. Griesedieck Western Brewing Co., 233 F. 2d 772, 775;

Kenny v. Alaska Airlines, Inc., 132 Fed. Supp. 838, 850.

Indeed, the California Supreme Court, in a case decided March 26, 1958, has stated that:

"Whatever limitation it ['doing business'] imposes is equivalent to that of the due process clause."

Henry R. Jahn & Son v. Superior Court, 49 A. C. 881, 884.

The *Jahn* case above cited is an excellent example of the attitude of the California courts. The dissent in that case (pp. 888-889 of 49 A. C.) accuses the court of holding that all persons residing and doing business outside California who place orders for goods in this State and arrange for the delivery of such goods, will be subject to suit in California. Apt illustrations of the California law, which govern the decision of this case, are to be found in *Duraladd Products Corp. v. Superior Court,* 134 Cal. App. 2d 226, 285 P. 2d 699, and *Gray v. Montgomery Ward, Inc.,* 155 Cal. App. 2d ....., 317 P. 2d 114 (reversing the court below).

C. If Higgins Is Amenable to Service of Summons Issued by a California Court, It Is Amenable to Service of Process Issued by the Court Below.

Rule 4(7) of the Federal Rules of Civil Procedure provides that summons and complaint may be served upon a foreign corporation

> "in the manner prescribed by the law of the state in which the service is made for the service of summons or other like process upon any such defendant in an action brought in the court of general jurisdiction of that state."

State law, particularly in a diversity case, governs the construction of this section. (*Kenny v. Alaska Airlines, Inc.,* 132 Fed. Supp. 838.)

D. Conclusion.

The law has developed and broadened in connection with modern concepts of due process in an advanced economy. It is clear that Higgins' activities in the State of California have established such contacts with this State, and with the transaction involved in this action, as to render it amenable to service of process here. Higgins, by reason of its activities here, will not be prejudiced by defending the action in California. It is respectfully submitted that the trial court erred, and must be reversed.

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